ROSLIZA IBRAHIM v. KERAJAAN NEGERI SELANGOR & ANOR

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
VERNON ONG LAM KIAT JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: B-01(A)-264-08-2017]
18 JANUARY 2019

CONSTITUTIONAL LAW: *Jurisdiction – Syariah Court – Applicant alleged that she was not professing religion of Islam – Whether applicant born to Muslim parents – Whether applicant legitimate person – Whether Syariah Court has jurisdiction over applicant – Whether Syariah Court has jurisdiction to decide whether applicant was no longer Muslim – Whether constitutional matter – Federal Constitution, art. 121(1A)*

ISLAMIC LAW: *Syariah Court – Jurisdiction – Applicant alleged that she was not professing religion of Islam – Whether applicant born to Muslim parents – Whether applicant legitimate person – Whether Syariah Court has jurisdiction over applicant – Whether Syariah Court has jurisdiction to decide whether applicant was no longer Muslim – Whether constitutional matter – Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss. 2 & 61(3)(b)(x)*

INTERPRETATION: *'parents' – 'parents' in para. (b) of interpretation of 'Muslim' in s. 2 of Administration of the Religion of Islam (State of Selangor) Enactment 2003 – Whether includes putative father of illegitimate child*

The appellant ('the plaintiff') filed an originating summons ('OS') at the High Court, seeking declarations that (i) she was an illegitimate person and one Yap Ah Mooi ('Yap'), a Buddhist, was her natural mother; (ii) the word 'parents' in para. (b) of the interpretation of 'Muslim' in s. 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('the Enactment') does not include the putative father of an illegitimate child; and (iii) the plaintiff was not a person professing the religion of Islam and that (a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, item 1 of the Federal Constitution had no effect on and application to the plaintiff; and (b) all Syariah Courts within the State of Selangor do not have any jurisdiction over the plaintiff. According to the plaintiff, (i) her birthday certificate stated that she was born on 19 November 1981 to Yap and one Ibrahim Hassan ('Ibrahim'); (ii) in Ibrahim's application for identification card ('IC'), his religion was stated as 'Islam' and his marital status was 'Berkahwin'; (iii) in Yap's application for IC, she declared herself as 'Cina', her religion as 'Buddha' and her marital status as 'Berkahwin'; and (iv) before her death, Yap affirmed a statutory declaration that (a) the plaintiff was her daughter; (b) she and Ibrahim were the plaintiff's parents but they were not married; and (c) the plaintiff was not brought up as a Muslim. The Judicial Commissioner ('JC') was of the

A opinion that the question of whether the plaintiff was a Muslim was dependent on whether Yap and Ibrahim were married and, based on available evidence, Yap and Ibrahim were married and the plaintiff was the child of the marriage. Dismissing the application, the JC held that the plaintiff (i) was a Muslim at birth; and (ii) the Syariah Court had the B jurisdiction to decide on whether the plaintiff was no longer a Muslim. Hence, the present appeal. In support of her appeal, the plaintiff submitted that, *inter alia*, (i) s. 1(3) of the Guardianship of Infants Act 1961 ('the Act') only excludes the application of the Act to any illegitimate child whose mother was a Muslim; and (ii) since Yap was not a Muslim, the Act applied C to both the plaintiff and her mother.

Held (dismissing appeal)
Vernon Ong Lam Kiat JCA delivering the judgment of the court:

(1) The Act relates to the question of guardianship and custody of an infant. The question of the applicability of the Act was a misnomer as the D plaintiff was no longer an infant. It could not be seen, in the particular circumstances of the case, in what manner the question of Act was relevant to the question of whether the plaintiff was not a person professing to the religion of Islam. The plaintiff's application was misconceived in law and in fact. (para 10)

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(2) The findings by the JC that Ibrahim and Yap were married; that the plaintiff was a child of the marriage; and that the plaintiff was a Muslim, was not wrong. The plaintiff was, in law and in fact, a Muslim pursuant to s. 2 of the Enactment. Section 2 of the Enactment provides that 'Muslim' means 'a person either or both of whose parents were at the F time of the person's birth, a Muslim'. This is especially clear in light of the undisputed fact that the plaintiff's father, Ibrahim, was a Malay and a Muslim. (para 12)

(3) Prayer (ii) of the plaintiff's OS was for a declaration that the plaintiff was not a person professing to the religion of Islam. Given the findings that G the plaintiff was a Muslim, the effect of the declaration sought was to enable the plaintiff to renounce Islam as her religion which, in effect, amounted to a declaration that the plaintiff was no longer a Muslim. The jurisdiction to determine this issue is vested in the Syariah Court pursuant to s. 61(3)(b)(x) of the Enactment. It was plain that the H plaintiff's avenue for the declaration sought was within the jurisdiction of the Syariah Court and not the civil court. The court was bound by the Federal Court's decision in *Lina Joy v Majlis Agama Islam Wilayah Persekutuan & Yang Lain.* The civil court was not seized with the jurisdiction to adjudicate on the matter. (paras 13 & 14)

I

***Bahasa Malaysia** Headnotes*

Perayu ('plaintif') memfailkan saman pemula ('SP') di Mahkamah Tinggi, memohon perisytiharan (i) dia seorang tidak sah taraf dan seorang bernama Yap Ah Mooi ('Yap'), yang beragama Buddha, ibu kandungnya; (ii) perkataan 'ibu bapa' dalam perenggan (b) tafsiran 'orang Islam' dalam s. 2 Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('Enakmen') tidak termasuk bapa seorang anak tidak sah taraf; dan (iii) plaintif bukan seorang yang menganut agama Islam dan (a) semua undang-undang yang digubal oleh Dewan Undangan Negeri Selangor bawah Jadual Kesembilan, Senarai II, item 1 Perlembagaan Persekutuan tiada kesan dan pemakaian pada plaintif; dan (b) semua Mahkamah Syariah di Negeri Selangor tidak mempunyai bidang kuasa atas plaintif. Menurut plaintif, (i) sijil kelahirannya menunjukkan dia dilahirkan pada 19 November 1981 kepada Yap dan seorang bernama Ibrahim Hassan ('Ibrahim'); (ii) dalam permohonan kad pengenalannya ('KP'), agama Ibrahim dinyatakan 'Islam' dan status perkahwinannya ialah 'Berkahwin'; (iii) dalam permohonan KP Yap, dia menyatakan dirinya 'Cina', beragama 'Buddha' dan status perkahwinannya ialah 'Berkahwin'; dan (iv) sebelum kematiannya, Yap membuat satu perisytiharan berkanun bahawa (a) plaintif anak perempuannya; (b) dia dan Ibrahim adalah ibu bapa plaintif tetapi mereka tidak berkahwin; dan (c) plaintif tidak dibesarkan sebagai orang Islam. Pesuruhjaya Kehakiman ('PK') berpendapat soalan sama ada plaintif seorang Muslim bergantung pada sama ada Yap dan Ibrahim berkahwin, dan berdasarkan keterangan sedia ada, Yap dan Ibrahim telah berkahwin dan plaintif anak hasil perkahwinan tersebut. Menolak permohonan, PK memutuskan plaintif (i) dilahirkan orang Islam; dan (ii) Mahkamah Syariah berbidang kuasa memutuskan plaintif bukan lagi orang Islam. Maka timbul rayuan ini. Menyokong rayuannya, plaintif menghujahkan, antara lain (i) s. 1(3) Akta Penjagaan Kanak-kanak 1961 ('Akta') hanya mengecualikan pemakaian Akta pada mana-mana anak tidak sah taraf yang ibunya orang Islam; dan (ii) oleh kerana Yap bukan orang Islam, Akta terpakai pada plaintif dan ibunya.

Diputuskan (menolak rayuan)
Vernon Ong Lam Kiat HMR menyampaikan penghakiman mahkamah:

(1) Akta berkenaan soalan penjagaan dan hak menjaga seorang kanak-kanak. Soalan pemakaian Akta adalah tidak padan kerana plaintif bukan lagi seorang kanak-kanak. Tidak dapat dilihat, berdasarkan hal-hal keadaan khas kes, dalam cara apakah soalan Akta relevan pada soalan sama ada plaintif bukan seorang yang menganut agama Islam. Permohonan plaintif satu salah tanggapan bawah undang-undang dan fakta.

(2) Dapatan PK bahawa Ibrahim dan Yap telah berkahwin; plaintif anak hasil perkahwinan tersebut; dan bahawa plaintif orang Islam, tidak salah. Plaintif, bawah undang-undang dan berdasarkan fakta, orang Islam menurut s. 2 Enakmen. Seksyen 2 Enakmen memperuntukkan 'orang Islam' bermaksud 'seseorang yang salah seorang atau kedua-dua

ibu bapanya, pada masa kelahiran orang itu, ialah orang Islam'. Ini khususnya jelas melihat pada fakta yang tidak dipertikaikan bahawa bapa plaintif, Ibrahim, seorang Melayu dan orang Islam.

(3) Permohonan (ii) SP plaintif adalah untuk perisytiharan bahawa plaintif bukan seorang yang menganut agama Islam. Berdasarkan dapatan plaintif orang Islam, kesan perisytiharan yang dipohon adalah untuk membolehkan plaintif meninggalkan Islam sebagai agamanya yang, kesannya, terjumlah sebagai perisytiharan bahawa plaintif bukan lagi orang Islam. Bidang kuasa menentukan isu ini terletak hak pada Mahkamah Syariah bawah s. 61(3)(b)(x) Enakmen. Jelas bahawa jalan plaintif untuk perisytiharan yang dipohon ialah dalam bidang kuasa Mahkamah Syariah dan bukan mahkamah sivil. Mahkamah terikat dengan keputusan Mahkamah Persekutuan dalam *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Yang Lain*. Mahkamah sivil tidak berbidang kuasa mengadili hal perkara ini.

Case(s) referred to:

In The Estate Of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid [1998] 4 CLJ 838 HC ***(refd)***

Lina Joy lwn. Majlis Agama Islam Wilayah Persekutuan & Yang Lain [2007] 3 CLJ 557 FC ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (State of Selangor) Enactment 2003, ss. 2(b), 61(3)(b)(x)

Federal Constitution, art. 121(1A), Ninth Schedule List II item 1

Guardianship of Infants Act 1961, s. 1(3)

For the appellant - Aston Paiva & Michael Cheah Ern Tien; M/s Amerbon

For the 1st respondent - Nik Suhaimi Nik Sulaiman, Mohd Syahrizal Syah Zakaria & Muhammad Haziq Hashim; State Legal Advisor, Selangor

For the 2nd respondent - Zainul Rijal Abu Bakar, Abdul Rahim Sinwan, Muhammad Zaki Sukery, Muhammad Akmal Abu Bakar & Muhamad Hisham Marzuki; M/s Zainul Rijal Talha & Amir

Watching brief:

1. Raja Noor Syuhada Raja Khairuddin; M/s Tan Law Practice (representing all under No. 1)

- Women's Aid Organisation

- All Women's Aid Action Society Malaysia

- Persatuan Kesedaran Komuniti Selangor (Empower)

- Sisters In Islam (SIS)

- Association of Women Lawyers (AWL)

- Perak Women for Women (PWW)

- Women's Centre for Change Penang (WCC)

- Persatuan Sahabat Wanita Selangor

Sabah Women's Action - Resource Group (SAWO)
Tenaganita
2. Philip TN Koh (M/s Mah Kamariyah & Philip Koh)
- Majlis Perundangan Malaysia Agama Buddha, Kristian, Hindu, Sikh dan Tao
3. Mansur Saad (Suhakam)

[Editor's note: For the High Court judgment, please see Rosliza Ibrahim lwn. Kerajaan Negeri Selangor; Majlis Agama Islam Selangor (Pencelah) [2017] 1 LNS 1934 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Vernon Ong Lam Kiat JCA:

Introduction

[1] In 2015, the plaintiff filed an originating summons at the Shah Alam High Court seeking the following declarations:

(i) a declaration that the plaintiff is an illegitimate person and that one Yap Ah Mooi a Buddhist was her natural mother;

(ii) a declaration that the word "parents" in para. (b) of the interpretation of "Muslim" in s. 2 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("2003 Enactment") does not include the putative father of an illegitimate child; and

(iii) a declaration that the plaintiff is not a person professing the religion of Islam, and that (a) all laws made by the Legislative Assembly of the State of Selangor under the Ninth Schedule, List II, Item 1 of the Federal Constitution are of no effect on, and are not applicable to the plaintiff; and (b) all Syariah Courts within the State of Selangor do not have jurisdiction over the plaintiff.

[2] On 22 June 2017, the learned Judicial Commissioner ("JC") dismissed the plaintiff's application with no order as to costs. This is the plaintiff's appeal against the said decision. On 25 April 2018, we dismissed the plaintiff's appeal and affirmed the decision of the learned JC after hearing of submissions. In this judgment, the parties shall be referred to as they were in the High Court.

Salient Facts

[3] The salient facts insofar as they relate to this case and which eventually led to the plaintiff's originating summons may be summarised as follows:

(i) According to the plaintiff's birth certificate, the plaintiff was born on 19 November 1981 at the Chinese Maternity Hospital Kuala Lumpur to one Yap Ah Mooi ("Mdm Yap") and one Ibrahim bin Hassan ("En Ibrahim");

(ii) Mdm Yap's residential address was recorded as 38B, Jalan Pasar, Pudu Kuala Lumpur;

(iii) En Ibrahim's application form for a new identity card for himself ("IC") on 22 June 1982 carried the same address;

(iv) On 13 January 1994, En Ibrahim, as the father of the plaintiff, submitted an application for an IC for the plaintiff where the plaintiff's religion is declared as "Islam" and residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Kuala Lumpur. Mdm Yap's 'keturunan' was declared to be "Melayu";

(v) On 14 January 1995, En Ibrahim submitted his own application for an IC wherein he declared that his residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Cheras, Kuala Lumpur, his religion as "Islam" and his marital status as "Berkahwin";

(vi) On 14 February 1995, Mdm Yap in her application for her IC declared that her residential address as 37, Jalan Bunga Matahari 3, Taman Maju Jaya, Cheras, Kuala Lumpur, her "keturunan" as "Cina", religion as "Buddha", and her marital status as "Berkahwin";

(vii) On 8 October 2008, Mdm Yap affirmed a statutory declaration ("SD") declaring that the plaintiff is her daughter, that she and En Ibrahim are the plaintiff's parents, that she and En Ibrahim were not married, and lastly that the plaintiff was not brought up as a Muslim;

(viii) Mdm Yap passed away on 7 February 2009.

Findings Of The High Court

[4] According to the learned JC, the question of whether the plaintiff is a Muslim is dependent on whether En Ibrahim and Mdm Yap were married. After considering the affidavit evidence and in particular the declarations made by En Ibrahim (see para. 3(v) above) and Mdm Yap (see para. 3(vi) above) of their marital status, the learned JC found that En Ibrahim and Mdm Yap were married and that the plaintiff is a child of the marriage. Further, the learned JC opined that the question of the validity of their marriage fell within the jurisdiction of the Syariah Court (para. 1 of List II - State List, Ninth Schedule to the Federal Constitution; *In the estate of Tunku Abdul Rahman Putra Ibni Almarhum Sultan Abdul Hamid* [1998] 4 CLJ 838; [1998] 4 MLJ 623).

[5] The learned JC discounted the affidavit of Chan Sew Fan which asserted that from 1985 to 1990 Mdm Yap who professed Buddhism had raised the plaintiff as a Buddhist in Taman Maluri, Kuala Lumpur. That assertion went against the undisputed fact that (i) En Ibrahim is a Muslim, (ii) the plaintiff's religion was declared as Islam in the application for the plaintiff's IC in 1994, (iii) the fact that En Ibrahim and Mdm Yap stayed together at the Jalan Pasar, Pudu address since 1981 until 1985,

(iv) En Ibrahim and Mdm Yap lived together around 1994-1995 at the Taman Maju Jaya, Cheras address as they each had declared their marital status as "Berkahwin" in their respective IC application forms. As such, the learned JC found that the plaintiff is a Muslim at birth.

[6] Consequently, the learned JC applied s. 61(3)(b)(x) of the 2003 Enactment in ruling that the Syariah Court had the jurisdiction to decide on the question of whether the plaintiff was no longer a Muslim.

Submission Of Parties

[7] The plaintiff's case was mounted on the premise that the plaintiff is an illegitimate child born to a Buddhist mother. Section 1(3) of the Guardianship of Infants Act 1961 ("GIA 1961") only excludes the application of the GIA 1961 to any illegitimate child, whose mother is a Muslim. Since Mdm Yap was not a Muslim, the GIA 1961 applies to both the plaintiff and her mother. En Ibrahim's declarations in his IC application form has no evidentiary value.

[8] Learned counsel for the plaintiff also argued that the fact of their declarations of their marital status "Berkahwin" did not prove the existence of a valid Muslim marriage. The truth of the contents of the written applications for ICs was not proven by the defendant and intervener, the said contents did not have any evidentiary value and should be disregarded for being irrelevant. As such, Mdm Yap's version as per her SD should have been accepted by the learned JC.

[9] Learned counsel for the defendant and the intervener respectively argued in support of the learned JC's decision. The GIA 1961 did not apply because the plaintiff is no longer an infant. The plaintiff's status is based on her IC and documents which show that she is a born Muslim and not a revert or a convert. If the plaintiff contends that she is not a Muslim, then she should have gone to the Syariah Court to seek a declaration under s. 61(3)(b)(x) of the 2003 Enactment. The records show that the plaintiff is a Malay and a Muslim. Learned counsel for the intervener also argued that the plaintiff is in law and in fact a Muslim pursuant to s. 2 of the 2003 Enactment. Therefore, it was submitted that the decision of *Lina Joy v. Majlis Agama Islam Wilayah Persekutuan & Yang Lain* [2007] 3 CLJ 557 (FC) is binding and the civil court has no jurisdiction to hear the matter.

Decision

[10] The GIA 1961 relates essentially to the question of guardianship and custody of an infant. In our considered view, the question of the applicability of the GIA 1961 is a misnomer. We say this because the plaintiff is no longer an infant. We also do not see how in the particular circumstances of this case, in what manner the question of guardianship of infants under the GIA 1961

A is relevant to the question of whether the plaintiff is not a person professing the religion of Islam (see prayer (iii) in para. [1] above). Therefore, in our considered view, the plaintiff's application is misconceived in law and in fact.

B **[11]** In this connection, we had also taken note of the fact that in 2009, the plaintiff had filed an action for judicial review (Guaman R4-25-216-2009) citing the Ketua Pengarah Pendaftaran Negara and Kerajaan Malaysia. In the 2009 action, the plaintiff sought *inter alia* for an order to change her name from Rosliza bt Ibrahim to Sek Lai Peng and for the word 'Islam' to be expunged from her IC. The plaintiff's application was dismissed by the High C Court and her appeal to the Court of Appeal was dismissed.

[12] We had carefully considered the evidence on the appeal record and the grounds of the learned JC's written judgment. We were not persuaded that the findings of the learned JC that En Ibrahim and Mdm Yap were married, that the plaintiff is a child of the marriage and that the plaintiff is a Muslim, D is plainly wrong. We also agreed with the submission of learned counsel for the intervener that the plaintiff is in law and in fact a Muslim pursuant to s. 2 of the 2003 Enactment which provides that a "Muslim" means "a person either or both of whose parents were at the time of the person's birth, a Muslim"; this is especially clear in the light of the undisputed fact that the E plaintiff's father En Ibrahim is a Malay and a Muslim.

[13] At any rate, we also observed that prayer (ii) of the plaintiff's originating summons is for a declaration that the plaintiff is not a person professing the religion of Islam. Given the findings that the plaintiff is a Muslim, the effect of the declaration sought is to enable the plaintiff to F renounce Islam as her religion; which in effect amounts to a declaration that the plaintiff is no longer a Muslim. The jurisdiction to determine this issue is vested in the Syariah Court pursuant to s. 61(3)(b)(x) of the 2003 Enactment. It is therefore plain that the plaintiff's avenue for the declaration sought is within the jurisdiction of the Syariah Court and not the civil court G (art. 121(1A) of the Federal Constitution).

[14] For the foregoing reasons, we did not think that there was any constitutional issue involved in this case. Whilst we empathise with the plaintiff's plight, this court is nevertheless bound by the Federal Court's decision in *Lina Joy (supra)*. The civil court is not seized with jurisdiction to H adjudicate on the matter. It falls within the province of the Syariah Court. Accordingly, the plaintiff's appeal was dismissed with no order as to costs.

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